Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

KATHERINE R. NAPLETON,
not individually, but as Trustee under the
Katherine R. Napleton Revocable Self-
Declaration of Trust Dated October 1, 1992,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. QUINLAN
Counsel of Record
JOHN F. KENNEDY
CATHERINE J. CASEY
JAMES A. NIEWIARA
QUINLAN & CRISHAM, LTD.
161 N. Clark Street
Suite 2300
Chicago, Illinois 60601
(312) 263-0900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether a district court's order dismissing an "embedded" proceeding without prejudice to allow for arbitration is a "final decision" and therefore immediately appealable under 28 U.S.C. §1291 and the Federal Arbitration Act?

2. If such a dismissal is not a "final decision" under 28 U.S.C. §1291, whether the Federal Arbitration Act supersedes 28 U.S.C. §1291 by preventing appeals of dismissal orders pending arbitration in "embedded" proceedings?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Katherine R. Napleton ("Katherine"), not individually, but as Trustee under the Katherine R. Napleton Revocable Self-Declaration of Trust Dated October 1, 1992, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 138 F.3d 1209 (per J. Cudahy, joined by J. Kanne; J. Wood dissenting), and is reprinted with the court's order in the Appendix hereto at pages App. 1 to App. 27. The decision and order of the United States District Court for the Northern District of Illinois is unreported and is reprinted in the Appendix at pages App. 28 to App. 31. The District Court's denial of the Petitioner's motion to reconsider is reprinted in the Appendix at page App. 32, and the Seventh Circuit's order denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* is reprinted in the Appendix at pages App. 33 to App. 34.

JURISDICTION

On March 18, 1998, a panel of the United States Court of Appeals for the Seventh Circuit issued its opinion holding that it lacked jurisdiction to decide the merits of Katherine's appeal. Katherine timely filed a petition for

rehearing and suggestion for rehearing *en banc* with the Court of Appeals on April 1, 1998. By order dated May 19, 1998, the Court of Appeals denied Katherine's petition, with five judges voting to grant a rehearing *en banc*, five judges voting against rehearing *en banc*, and one judge taking no part in the decision. Katherine then timely filed this petition for writ of certiorari. Katherine invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

9 U.S.C. §3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon

being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitration under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such

arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. §16. Appeals

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

STATEMENT OF THE CASE

A. Overview

This petition raises significant questions of federal appellate jurisdiction and asks this Court to grant certiorari in order to resolve the growing inter-circuit conflict regarding the appealability of orders which dismiss a case to allow for arbitration. One petition for certiorari already is on file with the Supreme Court presenting almost identical questions for review, in the matter of *McCarthy, et al. v. Providential Corporation, et al.*, No. 97-1815 (filed May 26, 1998). The Seventh Circuit panel majority in this case cited to the underlying *McCarthy* decision with approval, while Judge Wood's dissent invoked Judge Pregerson's *McCarthy* dissent. Katherine joins in the arguments set forth in the *McCarthy* Petition, in addition to those set forth below, in requesting that this Court grant her Petition. Moreover, Katherine has reason to believe that an additional Petition on this very issue soon will be filed with this Court in the matter of *Seacoast Motors of Salisbury v. Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998). These three Petitions reveal the significance of this issue and the need for Supreme Court review.

In this case, Katherine appealed from the district court's order which dismissed her action without prejudice "to allow for arbitration," arguing that her case did not involve a dispute which fell within the arbitration clause contained in the parties' lease. A panel of the Court of Appeals for the Seventh Circuit held, however, that it lacked jurisdiction to reach the issues presented by Katherine because the district court's dismissal order in

Katherine's "embedded" proceeding was not a "final decision" under the Federal Arbitration Act and therefore not appealable under 28 U.S.C. §1291. Katherine's petition for rehearing *en banc* to the Seventh Circuit failed by one vote.

As set forth in the *McCarthy* Petition and more fully below, the circuits are split as to the appealability of dismissal orders in embedded proceedings. The Seventh Circuit recognized this conflict, noting that "[o]ther circuits have addressed similar questions, though there is no unanimity in their answers." *Napleton*, 138 F.3d at 1212. In reaching its decision, the Seventh Circuit joined the Eighth and the Ninth Circuits in finding that dismissal orders pending arbitration in embedded proceedings are not immediately appealable. The First Circuit, citing the Seventh Circuit decision in *Napleton*, subsequently joined these circuits in the *Seacoast* case. The Third, Sixth and Tenth Circuits have specifically held, however, that they do have jurisdiction to review district court orders dismissing actions pending arbitration in embedded proceedings. The D.C. Circuit also has suggested in a similar case that it would favor appealability in these circumstances.

The questions presented involve not only questions of federal jurisdiction, but also questions involving the interplay between the Federal Arbitration Act and 28 U.S.C. §1291. Given the fact that this Court likely will see three Petitions on this same issue from three different circuits, it is clear that the questions for review are not

only contemporary but also are widespread in their application. For these reasons and those additional reasons expressed below, this Court should grant this Petition.

B. Factual Background

This case involves a lease dispute regarding commercial property owned by Katherine in Hinsdale, Illinois (the "Property"). Katherine leased the Property to General Motors under a written lease (the "Lease") originally entered in 1955 between General Motors and Katherine's predecessor-in-interest, New England Mutual Life Insurance Company. The Lease provided for several multi-year extensions which could be exercised by General Motors, as well as declining rental rates. In relevant part, the Lease was to terminate on December 31, 1995, unless General Motors gave Katherine written notice of its option to renew the Lease term by December 31, 1994. General Motors had actual and constructive knowledge of Katherine's ownership of the Property. General Motors identified Katherine as an additional insured on the insurance for the Property, and paid rent for the Property to Katherine. It is undisputed that General Motors failed to provide Katherine with the requisite timely notice, and the Lease therefore expired on December 31, 1995. As a consequence, Katherine was entitled to possession of the premises. Notwithstanding this fact, General Motors refused to vacate the property, arguing that notice given to Katherine's husband should excuse its undisputed failure to comply with the express terms of the lease renewal provision. General Motors still occupies the premises and pays Katherine only $876.69 monthly in rent for the entire

commercial office building and its improvements, a tiny fraction of its current market value.

C. Proceedings Below

Katherine initially brought this action in the Circuit Court of Cook County, Illinois seeking declaratory and injunctive relief. After a temporary restraining order was entered by the Circuit Court restraining General Motors from interfering with Katherine's right to market the Property for sale, General Motors removed the action to federal court based upon diversity of the parties.

Shortly after removal, General Motors filed its Motion to Dismiss or Stay Action Pending Arbitration in the district court, based upon the arbitration provision contained in the parties' Lease. Katherine opposed the motion arguing that the dispute did not fall within the limited scope of the narrow lease arbitration provision. The district court granted General Motors' Motion to Dismiss on July 29, 1996. In his order, Judge Duff stated, " . . . [T]his Court *grants the motion to dismiss without prejudice* to allow for arbitration." (emphasis added). Katherine timely moved for reconsideration of Judge Duff's order on August 12, 1996. The district court denied Katherine's motion to reconsider on August 23, 1996, and Katherine timely filed her notice of appeal.

After requesting that the parties submit memoranda on the issue of jurisdiction, the Seventh Circuit ordered that the jurisdictional issue be taken with the case. On March 18, 1998, after briefing and oral argument on both the jurisdictional issue and the merits, the panel issued its opinion holding that it lacked jurisdiction to decide the

merits of the appeal. While the panel majority and the dissent agreed that final decisions are appealable, the majority's decision effectively determined that the dismissal order in this case was not a "final decision." The panel majority's decision relied on a distinction between "embedded" and "independent" proceedings, and equated dismissals without prejudice with stay orders, arguably narrowing the scope of section 16(a)(3) of the Federal Arbitration Act and superseding 28 U.S.C. §1291.

On April 1, 1998, Katherine timely filed a petition for rehearing and suggestion for rehearing *en banc* with the Court of Appeals. By order dated May 19, 1998, the Seventh Circuit denied Katherine's petition, with five judges voting to grant a rehearing *en banc*, five judges voting against rehearing *en banc*, and one judge taking no part in the decision. Katherine then timely filed this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHETHER A DISTRICT COURT'S ORDER DISMISSING AN ACTION WITHOUT PREJUDICE PENDING ARBITRATION IN AN "EMBEDDED" PROCEEDING IS A "FINAL DECISION" AND THEREFORE IMMEDIATELY APPEALABLE.

A. Appealability Under The Federal Arbitration Act

The Federal Arbitration Act (the "Act") controls the appealability of district court arbitration decisions. The

Act generally favors arbitration by specifically providing for appellate review of orders denying arbitration. Thus, Section 16(a)(1) of the Act provides for appeals of orders:

> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed, [and]
>
> (C) denying an application under section 206 of this title to compel arbitration . . .

9 U.S.C. §16(a)(1).

Certain interlocutory orders compelling arbitration, however, are not immediately appealable. Section 16(b) of the Act thus provides that an appeal may not be taken from an interlocutory order:

> (A) granting a stay of any action under section 3 of this title;
>
> (B) directing arbitration to proceed under section 4 of this title; [or]
>
> (C) compelling arbitration under section 206 of this title . . .

9 U.S.C. §16(b).

"Final decisions" compelling *or* denying arbitration are immediately appealable under Section 16(a)(3), as follows:

> (a) An appeal may be taken from –
>
> * * *
>
> (3) a final decision with respect to an arbitration that is subject to this title.

9 U.S.C. §16(a)(3). This provision of the Act appears to be consistent with 28 U.S.C. §1291, which states in relevant part that "the courts of appeals . . . shall have jurisdiction from all final decisions of the district courts of the United States."

In examining the issue of appealability under the Act, circuit courts have traditionally distinguished between "independent" and "embedded" proceedings. As explained by the Seventh Circuit in this case, an "independent" proceeding is one in which "the request to compel arbitration is the sole issue before the district court," whereas an "embedded" proceeding is one where "the motion for arbitration is made in the course of a larger, substantive suit." *Napleton*, 138 F.3d at 1211 (citation omitted). This distinction has been paramount in federal jurisprudence and the application of the Federal Arbitration Act to jurisdictional issues covering appeals.

In finding that it had no jurisdiction over this case, the Seventh Circuit's majority panel specifically relied on the fact that Katherine appealed from an embedded proceeding, stating as follows:

> Accordingly, we hold that it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration. We will continue to find jurisdiction over appeals from independent proceedings and decline to find jurisdiction over appeals from embedded proceedings.

Napleton, 138 F.3d at 1212. In so ruling, the Seventh Circuit established a *per se* rule allowing for jurisdiction over

appeals from independent proceedings and declining to accept jurisdiction over appeals from embedded proceedings. *Id.* While the Seventh Circuit is not alone in making the distinction between independent and embedded proceedings, it is the Court of Appeal's jurisdictional holding which is in conflict among the circuits. Specifically, it is the Seventh Circuit's refusal to assert jurisdiction over *any* district court order in an embedded proceeding which raises the questions presented for review.

Most, if not every, court of appeals considering this same jurisdictional issue has recognized a distinction between the appealability of district court orders in independent and embedded proceedings. The rule among the circuits is clear with respect to independent proceedings – every circuit permits an immediate appeal from orders both compelling arbitration and refusing to compel arbitration, under the express terms of the Act. Appellate Courts have granted jurisdiction over orders refusing to compel arbitration under Section 16(a)(1)(C). Moreover, Appellate Courts have held that orders compelling arbitration in independent actions are "final decision[s] with respect to an arbitration" under Section 16(a)(3).

An irreconcilable conflict arises in the circuits, however, as to whether jurisdiction exists over district court orders in embedded proceedings.[1] The circuits are not in agreement over the appealability of the district court orders in "embedded" proceedings which *dismiss* the

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[1] *See, e.g., Napleton,* 138 F.3d at 1212.

action without prejudice pending arbitration. The Seventh Circuit in this case, in agreement with the Eighth and Ninth Circuits (and now the First), refused to acknowledge the district court's dismissal order as a "final decision," instead holding that *any* district court order in an embedded proceeding fails this jurisdictional threshold. In contrast, the Third, Sixth and Tenth Circuits have focused on the district court's decision rather than the underlying nature of the case, and have treated dismissal orders in embedded proceedings as "final" and appealable under the Act and under 28 U.S.C. §1291. It is this conflict and the issues related to this conflict which the Supreme Court needs to address in order to bring continuity to the circuits' application of the Federal Arbitration Act and its interplay with 28 U.S.C. §1291.

B. The Circuit Split As To The "Finality" Of Dismissal Orders In Embedded Actions.

Both the Seventh Circuit panel majority and the dissent in this case agreed on a fundamental point: that final decisions are appealable, pursuant to both 28 U.S.C. §1291 and section 16(a)(3) of the Federal Arbitration Act ("Act").[2] *Napleton*, 138 F.3d at 1211, 1215-16 (J. Wood dissenting). By nevertheless finding that it lacked jurisdiction to hear Katherine's appeal, the panel majority

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[2] 28 U.S.C. §1291 provides in relevant part that the courts of appeals "shall have jurisdiction from all final decisions of the district courts of the United States . . . " Section 16(a)(3) of the Federal Arbitration Act provides that an appeal may be taken from "a final decision with respect to an arbitration that is subject to this title."

effectively held that dismissal orders without prejudice in "embedded" proceedings are not "final decisions" subject to appeal under either the Act or 28 U.S.C. §1291. In dissent, Judge Wood argued that an order of dismissal is final, even if entered in an embedded proceeding, as follows: "If the district court (rightly or wrongly) throws out the entire case, the fact that the parties will go forward with their arbitration does not mean that there is something left pending on the district court's docket." *Id.* at 1217 (J. Wood, dissenting). Judge Wood also noted that the panel majority construed the Act as "creating an implied exception to §1291," and that the majority's decision to qualify Section 16 with the "embedded" or "independent" distinction has "muddied the waters" in predicting the "overall application of §1291." *Id.*

1. Circuits Allowing An Immediate Appeal

In making its decision, the Seventh Circuit panel majority refused to follow those circuits recognizing an immediate appeal of a district court's dismissal order pending arbitration in an embedded proceeding. Prior to the Appellate Court's decision in the case, three circuits – the Third, Sixth, and Tenth – held that jurisdiction exists over appeals from embedded proceedings involving orders of dismissal. In *Nationwide Insurance v. Patterson*, 953 F.2d 44 (3d Cir. 1991), the Third Circuit ruled that it had jurisdiction to hear an appeal of a dismissal order, noting that "although the parties will arbitrate their dispute, the district court's dismissal of Nationwide's action plainly signifies that this arbitration is not part of any ongoing proceeding." *Id.* at 46. The court therefore held

that it had appellate jurisdiction in the case pursuant to 28 U.S.C. §1291. *Id.*

In *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990), the district court granted the defendant's motion to compel arbitration, but the court's order was silent as to the defendant's request to stay the proceedings pending arbitration. The Sixth Circuit vacated the district court's judgment and remanded the case for clarification. The district court then dismissed the plaintiff's claims and compelled arbitration, denying the alternative motion to stay as "moot." On appeal for a second time, the Sixth Circuit held that it had jurisdiction over the dismissal order, noting that the district court's dismissal order was not "interlocutory," having dismissed the Complaint "in its entirety" while denying the defendant's motion to stay. Perhaps more significantly, the *Arnold* court found the Act's legislative history "dispositive." The Committee on the Judiciary, in commenting on what is now Section 16 of the Act, stated:

> Moreover, under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, or *a final judgment dismissing an action in deference to arbitration*. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court. . . .

Id. at 1274-75 (emphasis in original) (citing to Committee on the Judiciary, Section by Section Analysis on S1482, 100th Cong., 2d Sess., 134 Cong.Rec. S16284, Oct. 14, 1988

(emphasis added)). The Sixth Circuit held that the district court's order was both a "final judgment" because it "end[ed] the litigation on the merits and [left] nothing for the court to do but execute the judgment," and one "dismissing an action in deference to arbitration." *Id.* at 1275-76.[3] In accordance with the legislative history, then, the Sixth Circuit found jurisdiction under both the Act and 28 U.S.C. §1291.

The Tenth Circuit also favors appealability of dismissal orders in embedded actions. In *Armijo v. Prudential Insurance*, 72 F.3d 793 (10th Cir. 1995), the defendant successfully moved to dismiss the complaint without prejudice and compel arbitration. On appeal, the Tenth Circuit found that "in this case, the district court's order granting [the defendant's] motion to compel arbitration and to dismiss Plaintiffs' claims was clearly a final order, permitting us to exercise jurisdiction over this case pursuant to 28 U.S.C. §1291." *Id.* at 797.[4]

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[3] The Sixth Circuit also noted in *Arnold* that the legislative history of Section 16 of the Federal Arbitration Act states that appeals should not depend on the procedural posture of the case. *Arnold*, 920 F.2d at 1275-76

[4] The Tenth Circuit also has held that a stay order, rather than a dismissal, is appropriate relief in the district court where such relief is requested. *See Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994) (holding that it would have had jurisdiction over dismissal order, but that the appropriate result was to reverse and order the district court to enter the stay requested by defendant). This ruling still conflicts with the Seventh Circuit's opinion in *Napleton*, and further supports Katherine's Petition for Certiorari.

Finally, the D.C. Circuit has suggested that it might favor appealability in similar circumstances. In *M.A. Everett v. US Airways Group*, 132 F.3d 770 (D.C. Cir. 1998), the district court dismissed some claims pending arbitration and stayed one remaining claim. On appeal, the D.C. Circuit held that the stay rendered the district court's order "nonfinal." The D.C. Circuit's opinion, however, suggests that, absent the stay, the dismissal would have been final and appealable.

2. Circuits Refusing An Immediate Appeal

The Seventh Circuit joined the Ninth Circuit in refusing to grant jurisdiction over Katherine's appeal because it was a dismissal order in an "embedded" proceeding. Four circuits in total have adopted this approach, finding that dismissal orders pending arbitration in embedded proceedings are not immediately appealable – the First, Seventh, Eighth and Ninth Circuits.

Most recently, in *Seacoast Motors of Salisbury v. Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998), the First Circuit, citing *Napleton*, held that it lacked jurisdiction on appeal of the district court's order granting the defendant's motion to dismiss the case and compel arbitration. In so ruling, the Court of Appeals expressly adopted the Seventh Circuit's analysis in this case, finding that the dismissal order was not "final" because the action was an "embedded" proceeding. Like the Seventh Circuit, the First Circuit held that it was the nature of the proceeding below rather than the district court's order that determined the court's jurisdiction on appeal.

Similarly, in *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994), and *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997) (Petition pending with this Court), the Eighth and Ninth Circuits found that they lacked jurisdiction where the district court dismissed cases brought under the Truth in Lending Act and ordered the parties to arbitrate. The two-judge majority in *McCarthy* followed the reasoning of *Gammaro*. In *Gammaro*, the Eighth Circuit ruled that it lacked jurisdiction to hear the appeal of this decision because "[t]he action before us is a typical example of an embedded proceeding." 15 F.3d at 95. Thus, the *Gammaro* panel majority found the dismissal order to be "interlocutory," and noted that its construction of 9 U.S.C. §16 precluded the plaintiff's separate argument that appellate jurisdiction existed under 28 U.S.C. §1291. As Judge Wood noted in her *Napleton* dissent, such a ruling implies that the Federal Arbitration Act supersedes Section 1291.

The Ninth Circuit in *McCarthy* also equated "embedded" proceedings with non-final orders, holding that it too lacked jurisdiction over the plaintiffs' appeal of the lower court's dismissal order compelling arbitration. The panel majority opined that, notwithstanding the dismissal of the entire proceeding below and the entry of a final judgment in a separate document pursuant to Federal Rules of Civil Procedure 58 and 79, Section 16 of the Federal Arbitration Act precluded review under 28 U.S.C. §1291.

Three other circuits – the Second, Fourth, and Fifth – have suggested that they too would find no appellate jurisdiction in embedded proceedings, although these

cases do not involve clear orders of dismissal. Like the panel majority in *Napleton*, the Fifth Circuit concluded in *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996), that "[t]he appropriate test of finality is whether the order involved an independent or embedded proceeding. An order involving an embedded proceeding is always an interlocutory order; an order involving an independent claim is always final." *Id.* at 771. The Fourth Circuit in *In re Pisgah Contractors*, 117 F.3d 133 (4th Cir. 1997), also concluded that "[e]ven where a district court's order compelling arbitration compels the arbitration of all substantive claims involved in the dispute, that order is not 'final' for purposes of appealability, unless the only issue before the district court was whether an order directing arbitration should be issued or not." *Id.* at 136. Finally, in *Ermenegildo Zegna Corp. v. Lanifico Mario Zegna, S.p.A.*, 133 F.3d 177 (2d Cir. 1998), the Second Circuit concluded that "orders directing arbitration [in embedded proceedings] are not appealable absent certification by the district court pursuant to 28 U.S.C. §1292(b)."

3. The Circuit Conflict Causes Additional Confusion As To The Interplay Between The Federal Arbitration Act And 28 U.S.C. §1291.

The inter-circuit conflict further highlights the courts of appeals' confusion over the interplay between Section 16 of the Federal Arbitration Act and 28 U.S.C. §1291. As noted in Judge Wood's dissent, the Seventh Circuit's *per se* rule in this case (and in those circuits aligned with the *Napleton* decision), denying jurisdiction over *any* decision of the district court compelling arbitration in "embedded" proceedings, construes the Act "as creating an

implied exception to §1291 . . . " *Napleton*, 138 F.3d at 1217. This result, as pointed out in the *McCarthy* Petition, contravenes the maxim that "legislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, 'absent a clearly expressed congressional intention to the contrary.' " *McCarthy* Petition for Certiorari, 97-1895 (filed May 26, 1998) (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) (citation omitted)).

Here, notwithstanding the inter-circuit conflict, it appears that Section 16 of the Act and Section 1291 are consistent with one another and are "capable of coexistence." Section 1291 clearly states that the courts of appeals "*shall* have jurisdiction" over "*all* final decisions of the district courts of the United States." 28 U.S.C. §1291 (emphasis added). Similarly, Section 16(a)(3) of the Act allows for an appeal from "a final decision with respect to an arbitration that is subject to this title." The legislative history of Section 16 further states that Section 16(a)(3) was meant to include appeals from final judgments dismissing an action in deference of arbitration,[5] and neither Section 16 nor Section 1291 differentiate between "embedded" and "independent" proceedings.

Given the inter-circuit conflict interpreting Section 16 and Section 1291, this Court should accept Katherine's Petition and definitively resolve that conflict. It is only then that Congress will know if it needs to address this issue again to clarify its original intentions under these statutes.

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[5] *See* page 16, *supra*.

II. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES QUESTIONS WHICH ARE CENTRAL TO THE ADMINISTRATION OF OUR FEDERAL APPELLATE JUSTICE SYSTEM.

This Court's review is needed because the inter-circuit conflict discussed above has a significant and far-reaching impact on the administration of justice within the federal appellate system. As more and more contracts are drafted to include arbitration provisions, increasing numbers of litigants will be placed in the exact position as Katherine Napleton. The impact of this issue in the lower courts is illustrated by the fact that multiple litigants are currently seeking this Court's review of this identical issue. See *McCarthy et al. v. Providential Corp., et al.*, No. 97-1895 (filed May 26, 1998). Ever-increasing numbers of litigants seeking review of a dismissal order to allow for arbitration will only exacerbate the current inter-circuit conflict until and unless this Court brings clarity to this important area of law.

This Court has long recognized the need for stability and clarity in administering the doctrines of finality and appealability. See, *e.g., United States v. Indrelunas*, 411 U.S. 216 (1973) (holding that Federal Rule of Civil Procedure 58's separate document provision must be mechanically applied, despite being criticized as overly formalistic, in order to avoid new uncertainties as to the date upon which a judgment is entered.). Moreover, this Court has highlighted the importance of maintaining "operational consistency and predictability in the overall application of §1291." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). This Court's guidance is necessary so that the lower courts understand that they must apply the clear

and unambiguous terms of the Federal Arbitration Act and Section 1291, rather than continue to construct and rely upon a muddied distinction between "embedded" and "independent" proceedings which is not found in either statute.

Indeed, Katherine's suit demonstrates the serious impact on litigants that will persist until this Court addresses this issue. Arbitration clauses are now routinely inserted in a variety of contracts which affect commercial obligations, property rights, leasehold relationships and virtually every other area of commerce. As reflected in all of the Circuits, resolution of the issues raised in Katherine's petition are of nationwide importance, and this Court's resolution of these issues will clarify the rights and obligations of parties involved in these commercial enterprises. Judicial economy and the interests of the litigants also will be served by establishing appellate jurisdiction over Katherine's appeal. Given the nature of the arbitration clause in the lease between Katherine and General Motors, the Seventh Circuit's review of the District Court's decision may be completely dispositive of the rights of the parties and could terminate what would otherwise be lengthy and expensive litigation. For example, if the Seventh Circuit were to exercise jurisdiction and find, as Katherine has argued, that the arbitration clause does not apply because General Motors has admittedly failed to give actual and timely renewal notice to Katherine to renew the lease term, then there is no dispute of performance or nonperformance under the lease and judgment could be granted in favor of Katherine as a matter of law without further proceedings. Should the Seventh Circuit's decision

regarding jurisdiction be allowed to stand, however, Katherine (and General Motors) will be required not only to finance lengthy arbitration on the lease issues, but then also to file yet another lawsuit to raise the very issues originally disposed of by the district court in the first instance. This is exactly the type of situation which the final judgment rule and the provision of the Federal Arbitration Act and 28 U.S.C. §1291 are intended to avoid. Because federal appellate litigants are entitled to stability and clarity in this important area of appellate jurisdiction, this Court's review is necessary.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner Katherine Napleton respectfully requests that the petition for writ of certiorari be granted.

Dated: August 17, 1998

Respectfully submitted,

WILLIAM R. QUINLAN
Counsel of Record
JOHN F. KENNEDY
CATHERINE J. CASEY
JAMES A. NIEWIARA
QUINLAN & CRISHAM, LTD.
161 North Clark Street
Suite 2300
Chicago, Illinois 60601
(312) 263-0900

Counsel for Petitioners

In the

United States Court of Appeals

for the Seventh Circuit

No. 96-3355

KATHERINE R. NAPLETON, not individually, but as Trustee under the Katherine R. Napleton Revocable Self-Declaration of Trust dated October 1, 1992,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96-C-0163 – **Brian Barnett Duff,** *Judge.*

ARGUED SEPTEMBER 22, 1997 – DECIDED MARCH 18, 1998

Before CUDAHY, KANNE, and DIANE P. WOOD, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Katherine Napleton appeals from a district court order dismissing her action without prejudice to allow for arbitration. She asserts that the district court misconstrued the scope of the arbitration clause and referred a non-arbitrable issue to arbitration. But because the district court issued its order favoring

arbitration in the course of an "embedded" proceeding, we lack jurisdiction to reach these issues.

I. Background

In 1955, General Motors Corporation leased property in Hinsdale, Illinois, from New England Life Insurance Company. The lease provided for an initial twenty-year rental term that ended on December 31, 1975. General Motors then had the option to renew the lease, first for a ten-year term ending on December 31, 1985, and then for a series of five-year terms, with the final one ending on December 31, 2005. General Motors had incentive to renew, because the lease specified fixed rental rates that decreased over time.[1] Not surprisingly, General Motors thrice renewed with New England, extending the lease through December 31, 1995.

New England transferred its fee interest in the Hinsdale property to Edward Napleton in December 1992. The day after Edward received the property, he conveyed it to his wife, Katherine Napleton.[2] Katherine also acquired from New England six properties outside of

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[1] During the initial twenty-year term, the rental rate was $3,177.99 per month for the first twelve years and $2,356.97 per month for the following eight years; during the ten-year renewal term, $1,095.86 per month; and during each five-year renewal term, $879.69 per month.

[2] During the events relevant here, Katherine has acted in her capacity as trustee for the Katherine R. Napleton Revocable Self-Declaration of Trust. For present purposes, however, this nuance is of no consequence. Thus we simply refer to "Katherine," not to "Katherine in her capacity as trustee."

Illinois. New England had leased these other properties to General Motors as well.

In June 1993, New England notified General Motors that it had assigned the Hinsdale lease to Edward and the non-Illinois leases to Katherine. New England's letter provided that General Motors should contact Edward whenever the Hinsdale lease required "payment, notice, demand or other communication" and Katherine when the non-Illinois leases so required. New England supplied the same address for both Edward and Katherine.

Although General Motors did not receive written notice that Edward had conveyed the Hinsdale property to Katherine, it nonetheless acted as though it knew Katherine was the owner. In September 1993, and February and December 1994, General Motors mailed Katherine statements of insurance for the Hinsdale property, as required by the lease. These statements listed Katherine as an additional insured. And in 1993, General Motors began to pay rent for the Hinsdale and non-Illinois properties with a single check made payable to Katherine.

The Hinsdale lease provided that to renew for a third five-year term that would extend until December 31, 2000, General Motors must notify the lessor by December 31, 1994. But on October 24, 1994, General Motors sent a written renewal notice to Edward – not Katherine – at the address previously provided by New England. When Edward failed to respond, General Motors, on January 17, 1995, sent him a copy of the October 24 renewal. On February 2, Edward informed General Motors that Katherine owned the Hinsdale property and that all

notices should be sent to her. Finally, on February 16, General Motors mailed Katherine a copy of the October 24 renewal notice.

Katherine did not respond immediately. Instead, in June 1995, she informed the company that she did not consider it to have renewed the lease and that it should vacate the property on December 31, 1995, the end of its current term. General Motors replied that it would not surrender the property; as far as it was concerned, the lease had not expired.

On December 15, 1995, Katherine filed for declaratory and injunctive relief in the Circuit Court of Cook County, Illinois. General Motors removed the action to federal district court. General Motors then argued that an arbitration clause in the lease governed its dispute with Katherine and it presented to the district judge a motion to dismiss or stay the action pending arbitration. The district judge agreed that the arbitration clause applied. Accordingly, he issued an order "grant[ing] the motion to dismiss without prejudice to allow for arbitration." Order of 7/29/96. After the district court denied Katherine's motion for reconsideration, she filed this appeal.

Katherine challenges the dismissal on the grounds that: (1) no issue falls within the scope of the arbitration clause and; (2) the district court has referred to an arbitrator the question whether an enforceable contract exists, which is an issue only a court may determine. Katherine also suggests that the record would allow us to decide as a matter of law that she is entitled to relief. We do not reach these arguments because we lack jurisdiction over Katherine's appeal.

II. Discussion

Katherine asserts that we have jurisdiction pursuant to 28 U.S.C. § 1291, which allows appeals from the final decisions of district courts. But we cannot take jurisdiction under § 1291 without first considering the Federal Arbitration Act, which controls the appealability of arbitration decisions by district courts. *See* 9 U.S.C. § 16. In general, the Act favors arbitration by assuring that appellate courts quickly review orders *denying* arbitration so that the parties may proceed promptly to an arbitrator if the district court has erred. *See Perera v. Siegel Trading*, 951 F.2d 780, 783 (7th Cir. 1992). As for orders *compelling* arbitration, final decisions are appealable and interlocutory decisions are not.[3] *See id.* Because § 16 does not

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[3] Section 16 provides:

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(continued . . .)

define "final decision," we have announced that it is a "legal term of art" animated by prior judicial opinions. *Id.; see Amgen, Inc. v. Kidney Ctr. of Del. County, Ltd.*, 95 F.3d 562, 565 (7th Cir. 1996). Thus, to grapple with the implications of Katherine's dismissal without prejudice, we must look to our own precedents as well as to those of other circuits.

According to Katherine, the alpha and omega of the jurisdictional issue is that the district court dismissed her case, thereby divesting itself of jurisdiction and terminating all proceedings before it. But this alone cannot be dispositive, because we traditionally have distinguished between "independent" and "embedded" proceedings. In an independent proceeding, the request to compel arbitration is the sole issue before the district court. In an embedded proceeding, the motion for arbitration is made in the course of a larger, substantive suit. *See Perera*, 951 F.2d at 784-85. Here General Motors requested arbitration in the context of Katherine's action for declaratory and

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[3](. . . continued)

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16.

injunctive relief. Hence Katherine has appealed from an embedded proceeding.

To date the distinction between independent and embedded proceedings has had a talismanic significance in our jurisprudence. We consistently have found jurisdiction over appeals from arbitration orders in independent proceedings and have declined to find jurisdiction over appeals from arbitration orders in embedded proceedings. *Compare S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1523 (7th Cir. 1993) (finding jurisdiction over an appeal from an independent proceeding), *with Wilson Wear, Inc. v. United Merchants & Mfrs., Inc.*, 713 F.2d 324, 326 (7th Cir. 1983) (holding that an order granting a stay and compelling arbitration in an embedded proceeding is not final within the meaning of 28 U.S.C. § 1291), and *Whyte v. THinc Consulting Group Int'l*, 659 F.2d 817, 818 (7th Cir. 1981) (same). In some cases, our refusal to extend jurisdiction over appeals from arbitration orders in embedded proceedings is unremarkable; the order to arbitrate is akin to a "case management order" that does not touch on the merits of the claim and thus much work remains for the district court. *See In the Matter of Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 784 F.2d 831, 833 (7th Cir. 1986). However, we have even declined to find jurisdiction over an appeal from an embedded proceeding when the practical result of the order to arbitrate was to refer all claims to the arbitrator and terminate proceedings before the district court. *See Perera*, 951 F.2d at 785; *see also Humphrey v. Prudential Sec. Inc.*, 4 F.3d 313, 317-18 (4th Cir. 1993). Katherine's appeal, however, adds an unfamiliar ingredient to the garden variety embedded proceeding. In most embedded proceedings, the district

court stays the action pending arbitration; here the judge substituted a dismissal without prejudice for the usual stay. Thus we must decide whether, in the context of an embedded proceeding, a dismissal without prejudice "to allow for arbitration" constitutes an appealable – i.e. final – decision.

Other circuits have addressed similar questions, though there is no unanimity in their answers. Both the Tenth and Third Circuits have held that a dismissal in favor of arbitration is an appealable decision, even in an embedded proceeding. *See Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 797 (10th Cir. 1995); *Nationwide Ins. Co. of Columbus, Ohio v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991); *see also Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (finding jurisdiction when the district court ordered arbitration, dismissed the proceedings and entered a Rule 54(b) judgment). In contrast, the Ninth Circuit has found that it lacks jurisdiction over an appeal from a dismissal in an embedded proceeding when the dismissal effectively requires the parties to arbitrate. *See McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997). Other circuits, while not expressly addressing the impact of a dismissal, seem to have hung their respective jurisdictional hats on the distinction between embedded and independent proceedings. *See, e.g., In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997) ("The issue of whether an order compelling arbitration may be immediately appealed as a 'final decision,' then, depends on whether the order was issued in an 'independent' action . . . or . . . an 'embedded' action. . . . "); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) ("The appropriate test of finality is whether the

order involved an independent or embedded proceeding. An order involving an embedded proceeding is always an interlocutory order; an order involving an independent claim is always final."); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (adopting a "bright-line rule" based on the distinction between independent and embedded proceedings).

For reasons that we explicate below, we elect to follow the Ninth Circuit and those other courts that have effectively determined that the jurisdictional lodestar of appealability is whether the decision favoring arbitration is from an independent or from an embedded proceeding. Accordingly, we hold that it is the nature of the underlying action, not the style of the district court's decision requiring arbitration, that determines whether we have jurisdiction over appeals from decisions granting arbitration. We will continue to find jurisdiction over appeals from independent proceedings and decline to find jurisdiction over appeals from embedded proceedings.

This conclusion comports with our own case law. In *Perera*, we repeatedly emphasized the significance of the distinction between independent and embedded proceedings.[4] *See, e.g.*, 951 F.2d at 785 ("In fact, this court has

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[4] The dissent argues that our approach is in serious tension with *Perera*, Dissent Op. at 17, which stated that the term "final decision" is "a legal term of art traditionally used to distinguish appealable and nonappealable lower court decisions under 28 U.S.C. § 1291 – the general provision governing appellate jurisdiction." *Perera*, 951 F.2d at 783. But the dissent overlooks that opinion's critical next sentence: "Judicial decisions have given meaning to this term of art." *Id.* And as we explain, our precedent has consistently held that the term "final decision"

found jurisdiction where the sole issue before the [district] court was arbitration and denied jurisdiction where arbitration was raised in an embedded proceeding."); *id.* ("[Prior] cases demonstrate that this court finds arbitration orders final if arbitration is the sole issue before the court and interlocutory if raised in an embedded proceeding."). *Perera's* discussion of prior cases further illustrates that this Circuit has focused, almost myopically, on whether a proceeding is independent or embedded. For example, *Perera* discussed the extension of jurisdiction in *Synder v. Smith*, 736 F.2d 409 (7th Cir. 1984). *See Perera*, 951 F.2d at 785. There the district court dismissed the action in favor of arbitration. But what *Perera* found most significant about *Synder* was not the dismissal, but that "arbitration was the only issue before the [district] court." *Perera*, 951 F.2d at 785. And to the extent that any case predating § 16 of the Federal Arbitration Act implies that an arbitration order in an embedded proceeding would be "final" if it resulted in the dismissal of an action, *see, e.g., Wilson Wear*, 713 F.2d at 326, *Perera* suggests that such language is inapplicable in light of the Act. *See* 951 F.2d at 785 (disregarding this court's prior statement that an arbitration order is final if it terminates all proceedings before the district court) (citing *In re Chicago*, 784 F.2d at 833). In *Perera* we described the effects of appeals from independent and embedded proceedings; today we steadfastly adhere to that delineation.[5]

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does not encompass orders that require arbitration in embedded proceedings.

[5] *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), does suggest that we should exercise jurisdiction over a dismissal without prejudice in favor of arbitration. But *Farrand*

We also refused in *Perera* to elevate the form of a district court's order over its substance. There the district judge seemingly wanted the appellate court to extend jurisdiction over Perera's appeal – the judge entered a Rule 54(b) judgment with respect to his order compelling Perera to arbitrate and also invited this court to grant jurisdiction pursuant to 28 U.S.C. § 1292(b). *See Perera*, 951 F.2d at 781. After finding that the embedded nature of Perera's claim was dispositive on the issue of jurisdiction, we noted that "the entry of a Rule 54(b) judgment does not change the interlocutory nature of the district court's order. . . . [T]he district court cannot expand this court's appellate jurisdiction by simply entering a Rule 54(b) judgment." *Id.* at 786. Similarly, a rule that gave weight to whether the district judge dismissed rather than stayed an action would allow a district court to determine the jurisdiction of an appellate court. If the district court stayed the action, the parties would arbitrate; if the district court dismissed the action, the party seeking to avoid arbitration could appeal immediately. *See McCarthy*, 122 F.3d at 1244. We agree with the Ninth Circuit that Congress could not have "intended this arbitrary result when it barred appellate review of interlocutory orders compelling arbitration." *Id.* Therefore we decline in this

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contains no discussion of the independent/embedded distinction that has dominated this Circuit's other opinions, nor does its treatment of the jurisdictional question suggest that the issue was argued extensively, as it was here. In sum, we do not believe that *Farrand* was intended to stultify the reasoning of *Perera*; nor, apparently, do the parties, as neither has invoked *Farrand* here.

case to leave the jurisdictional trump card in the hand of the district court.[6]

In advocating that we exercise jurisdiction, Katherine asserts that doing so would promote judicial economy. As she views it, if we were to reach the merits, we might find that the arbitration clause is inapplicable because General Motors failed to timely notify Katherine of its intent to renew the lease. This would amount to a holding that the lease is no longer valid, and hence Katherine would be entitled to declaratory and injunctive relief as a matter of law.

Whether this scenario is plausible here is not for us to say at this juncture. However, in general, we perceive the issue of judicial economy differently in light of the national policy favoring arbitration. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . . "). The rule Katherine advances – that we extend jurisdiction over appeals from dismissals without prejudice "to allow

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[6] The dissent states, "Neither the parties nor the district courts are likely to choose casually between the two options [of a stay or dismissal without prejudice]." Dissent Op. at 21. But here General Motors styled its motion "a motion to dismiss or stay pending arbitration." As far as anyone knows, the district court chose dismissal to rid its calendar (temporarily) of the case. Moreover, in circumstances where "important rights are at stake that at least one party . . . wish[es] to protect," *id.*, the parties remain free to advocate either a stay or a dismissal without prejudice. All we hold today is that for the purposes of determining whether we have jurisdiction over an appeal, a dismissal without prejudice and a stay will be treated the same.

for arbitration" in embedded proceedings – is likely to result in an inordinate number of appeals in which we simply affirm the district court's deference to an arbitration clause. On this point, the decisions in *Armijo* and *Nationwide* are instructive. In both cases the appellate courts, after laboriously exercising jurisdiction over dismissals in embedded proceedings, merely affirmed that the parties should litigate their claims before arbitrators.[7] *See Armijo*, 72 F.3d at 800; *Nationwide*, 953 F.2d at 49; *see also Arnold*, 920 F.2d at 1281 (affirming the referral to arbitration after finding jurisdiction over an appeal from a Rule 54(b) judgment in an embedded proceeding). In most cases, then, the most economical approach is not to allow an intermission for appellate review, but rather for the parties to proceed expeditiously to arbitration.

We are cognizant that our decision may result in Katherine, as she describes it, "spend[ing] significant time and resources pursuing arbitration, before . . . the propriety of arbitration is ever resolved." Pl.'s Br. at 17. But this consequence is not inconsistent with the Federal Arbitration Act; indeed, Congress must have anticipated such expenditures when it determined that interlocutory decisions favoring arbitration were not immediately appealable. *See* 9 U.S.C. § 16(b). The Act "evidences a 'pro-arbitration tilt,' which 'requires that, with respect to embedded actions, the party opposing arbitration- . . . bear the initial consequence of an erroneous district court decision requiring arbitration.' " *Gammaro*, 15 F.3d at 96 (*quoting Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 61 (2nd Cir. 1993)). Moreover, our adherence to

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[7] The dissent illustrates the same judicial diseconomy here.

the demarcation between independent and embedded proceedings corresponds with the Act's purpose of promoting greater use of arbitration. *See McCarthy*, 122 F.3d at 1245.[8]

Finally, as we have explained in the past, "the fact that the court of appeals could end the litigation does not make a decision on a single issue final." *Massey Ferguson Div. of Varity Corp. v. Gunley*, 51 F.3d 102, 105 (7th Cir. 1995). If it did, we would have jurisdiction "whenever a district judge addresses a single potentially-dispositive issue in the litigation." *Id.* Today's decision does not preclude review of the propriety of arbitration; instead, it merely "postpone[s] it until the arbitration proceeding has run its course." *McCarthy*, 122 F.3d at 1245; *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (holding that appellate review of a district court decision confirming or vacating an arbitration award on the basis of whether the parties "agreed to submit their dispute to arbitration, should proceed like review of any other district court decision finding an agreement between parties,

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[8] The dissent argues that the rule created by our opinion – that a party cannot appeal from a judgment favoring arbitration in an embedded proceeding – "will yield strange results." Dissent Op. at 19. To prove its point, the dissent poses a hypothetical involving two claims. The district court dismisses the counterclaim as time-barred and the primary claim "without prejudice to allow for arbitration." The dissent posits that the defendant would be "entitled to appeal immediately on its counterclaim." *Id.* But under our ruling today, the "dismissal without prejudice to allow for arbitration" would be a non-final judgment. Therefore the defendant's ability to pursue an immediate appeal would apparently depend on whether the district court entered a judgment pursuant to Rule 54(b).

i.e., accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*"). In sum, appellate review has never been in lockstep with each decision of the district court, no matter what the potential benefit to the parties. Accordingly, this appeal is dismissed for lack of appellate jurisdiction.

DIANE P. WOOD, *Circuit Judge*, dissenting. Procedural rules should not be matters of Byzantine complexity, known and accessible only to initiates who are privy to knowledge that is kept secret from the rest of the world. But that is the kind of rule I fear the majority has created in its decision to make our appellate jurisdiction turn on the distinction between "independent" and "embedded" proceedings, even when a party is seeking to appeal under 28 U.S.C. § 1291 from a final judgment dismissing an action. Because I believe that there is a crucial difference between an order staying an arbitration proceeding, and an order directing the entry of a final judgment dismissing an action so that arbitration may proceed, I respectfully dissent from the majority's conclusion that we have no jurisdiction over Katherine Napleton's appeal.

As the majority recounts, this action began as a claim for declaratory and injunctive relief in the Circuit Court of Cook County, brought by Katherine Napleton to determine whether the lease of her property to General Motors had properly been renewed for the term beginning January 1, 1996. General Motors removed the case to federal court and then argued that an arbitration clause in the lease governed the dispute. It moved to dismiss or stay the action pending arbitration. The district court agreed that the arbitration clause applied and on July 29, 1996,

issued an order "grant[ing] the motion to dismiss without prejudice to allow for arbitration." Katherine filed a motion for reconsideration, which the court denied on August 22, 1996. She then filed this appeal.

The first question, in my view, is whether the district court's order of July 29, 1996, amounted to a "final judgment," as that term is used in 28 U.S.C. § 1291: that is, is there a judgment that finally disposed of all claims of all the parties? Although there is ordinarily a difference between an order dismissing a complaint without prejudice, and a final judgment entered pursuant to Fed. R. Civ. P. 58, there are times when we must look beyond the surface to see which of those actions the district court has actually taken. We had occasion to consider this very problem, in a context implicating arbitration, in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993). There the district court entered an order dismissing an action without prejudice and specifically noted that nothing in its order was intended to prevent arbitration of the plaintiff's claims. *Id.* at 1254. On the subject of the order's finality, we had this to say:

> An order dismissing a complaint "without prejudice" usually is not appealable, because the plaintiff may file an amended complaint. The judgment and accompanying opinion show, however, that no amendment is possible, which makes the order final and appealable.

Id. Thus, the mere fact that the dismissal was "without prejudice" does not alone deprive the judgment of its finality. *See United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794-95 n. 1 (1949); *Trippe Mfg. Co. v. American Power*

Conversion Corp., 46 F.3d 624, 626 (7th Cir. 1995) (distinction for appealability purposes is not whether dismissal was with or without prejudice, but rather whether dismissal was of complaint or entire action); *Farrand*, 993 F.2d at 1254; See generally 15A Charles Alan Wright, *et al.*, Federal Practice and Procedure § 3914.6, at 533 & n. 18 (2d ed. 1992). Nor is the lack of a judgment formally entered pursuant to Fed. R. Civ. P. 58 fatal to our ability to find a final judgment over which we may assume jurisdiction, provided that (1) the district court clearly intended its order to represent the final decision in the case, (2) the judgment of dismissal was entered in the clerk's docket, and (3) the prevailing party did not object to the taking of an appeal in the absence of a separate judgment. See generally *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (stating that the "sole purpose" of the separate entry of judgment requirement in Fed. R. Civ. P. 58 is to clarify when the time for appeal begins to run); *Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994) (en banc).

In the present case, neither the fact that the order was "without prejudice" nor the absence of a formal entry of judgment under Fed. R. Civ. P. 58 deprives the order of its appealability. The district court's (docketed) order makes clear that no amendment of Napleton's complaint would change the outcome and that the dismissal was for the entire action, not just the complaint. (The finality of the district court's decision is further underscored by its order of August 22, 1996, denying Napleton's motion for reconsideration.) And although General Motors challenges our jurisdiction on appeal, the company's argument is not based on the lack of a separate entry of

judgment under Fed. R. Civ. P. 58 *per se*, but rather on the intervention of the Federal Arbitration Act (FAA). The case might be different if, for example, General Motors complained that the missing entry of judgment somehow caused it prejudice. But that is not the case before us, and thus the lack of a formal entry of judgment under Fed. R. Civ. P. 58 is not determinative. Following *Farrand*, because the district court's order plainly dismissed the entire action without prejudice, we have here an order that is final and appealable – unless something in the FAA supersedes § 1291.

The relevant part of the FAA is found, as we all agree, at 9 U.S.C. § 16. I set forth its language again in full, for ease of reference:

> (a) An appeal may be taken from –
>
> (1) an order –
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting, or vacating an award;
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

> (3) a final decision with respect to an arbitration that is subject to this title.
>
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

This language on its face identifies two broad classes of cases in which an appeal is possible, and one in which it is not. Subsection (a) allows appeals (1) from orders that somehow prevent arbitration from going forward, and (2) from final decisions with respect to an arbitration subject to the FAA, while subsection (b) prohibits an appeal from interlocutory orders that in one way or another allow the arbitration to proceed.

The issue that divides me from the majority is whether the fact that the request for arbitration was included (or "embedded") in a broader lawsuit, in which the parties were also litigating other issues, prevents an otherwise final judgment from being "a final decision with respect to an arbitration" as that term is used in § 16(a)(3). Under the majority's approach, when we are dealing with arbitration, only a subset of final judgments that satisfy § 1291 are cognizable in the courts of appeals: judgments that are "final" as § 1291 uses the term *and*

that are issued in an "independent" proceeding rather than an "embedded" proceeding. Like my colleagues in the Tenth and Sixth Circuits, however, and like the dissenting judge in the Ninth Circuit decision on which the majority relies so heavily, I see nothing in § 16(a)(3) that justifies such a reading. See *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995) (relying on *Farrand*); *Arnold v. Arnold Corp.-Printed Communications for Business*, 920 F.2d 1269, 1274-76 (6th Cir. 1990); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1246-49 (9th Cir. 1997) (Pregerson, J., dissenting). See also *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 61 n.3 (2d Cir. 1993) (dictum stating that "[h]ad the complaint been dismissed [instead of stayed], it is arguable that an appeal would be immediately available"). Furthermore, the language of FAA § 16(b) clearly distinguishes between interlocutory orders, from which appeals are strictly limited, and final orders, for which the FAA does not modify the normal rule of appealability.

I therefore regard the language of the FAA itself as reason enough to reject the majority's view of our jurisdiction. The majority says that it is relying on *Perera v. Siegel Trading Co.*, 951 F.2d 780 (7th Cir. 1992). In my view, however, its approach is in serious tension with *Perera*, which held that the term "final decision" in § 16(a)(3) is "a legal term of art traditionally used to distinguish appealable and nonappealable lower court decisions under 28 U.S.C. § 1291 – the general provision governing appellate jurisdiction." *Id.* at 783. Because the FAA contains no alternative definition of the term "final decision," this court ruled in *Perera* that "by using a term of art Congress intended to retain its preexisting meaning."

Id. (I do not find the court's next comment, to the effect that judicial decisions have elaborated on the meaning of the term "finality," to be as "critical" as the majority does. See *ante*, note 4. The decisions under § 1291 distinguishing between something that resolves all claims of all parties, and other dispositions, are too legion to cite. The majority cannot escape the fact that it is construing the FAA as creating an implied exception to § 1291, in the face of language in the FAA that expressly disclaims such a result.)

Under the established preexisting meaning of § 1291, we would have to be able to conclude that a dismissal of an action without prejudice is somehow non-final or interlocutory before we would even reach the question whether the arbitration request initially arose in an "embedded" proceeding or an independent one. Judge Pregerson put the point well in his *McCarthy* dissent when he said:

> While orders compelling arbitration in all independent arbitrability proceedings are necessarily final decisions, it does not logically follow that orders in all embedded arbitrability proceedings are necessarily interlocutory.

122 F.3d at 1247. If the district court (rightly or wrongly) throws out the entire case, the fact that the parties will go forward with their arbitration does not mean that there is something left pending on the district court's docket. There is not, and this makes the difference between an order staying proceedings (which is certainly not appealable, see 9 U.S.C. § 16(b)(1)) and an order dismissing the action, far more important than the majority allows. We should not ignore the "final decision" language of

§ 16(a)(3) in favor of what the majority concedes has sometimes been this court's "myopic" and "talismanic" adherence to the independent/embedded distinction. *Cf.* Majority Op. at 6, 8.

To do so disregards the Supreme Court's admonition in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988), to preserve "operational consistency and predictability in the overall application of § 1291." It also ignores the history of FAA § 16, which was enacted after the Supreme Court overruled the *Enelow-Ettelson* doctrine, under which orders staying "legal" proceedings (*i.e.*, the action in district court) on "equitable" grounds (*e.g.*, the special defense setting up the arbitration agreement as taking precedence) had been treated as injunction orders appealable under 28 U.S.C. § 1292(a)(1). See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287 (1988), overruling the line of cases based upon *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935), and *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). After *Gulfstream Aerospace* overruled the *Enelow-Ettelson* avenue for appealing orders staying or refusing to stay arbitration proceedings, some confusion continued because it was still possible that the collateral order doctrine might sometimes permit an immediate appeal from such an order. Section 16 was enacted as part of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, in order to furnish a clear rule for appealability of orders relating to arbitration proceedings. Without any warrant in the statute, the majority's decision to qualify § 16 with the "imbedded" or "independent" distinction has muddied the waters considerably.

Furthermore, the majority's rule will yield strange results. For example, suppose that a Seller and a Buyer enter a contract for the sale of raw materials and that the contract includes an arbitration clause. After the Seller fails to deliver as promised, the Buyer covers on the open market and sues to recover damages. In its answer, the Seller: (1) moves to dismiss the Buyer's lawsuit on the basis of the arbitration clause; (2) permissively counterclaims for an outstanding, unrelated credit debt from several years earlier; and (3) argues in the alternative that either it did not breach the contract, or that any damages it owes should be offset by the Buyer's outstanding debt. Then suppose that the district court dismisses the Seller's counterclaim as time-barred, and also dismisses the Buyer's action for damages "without prejudice to allow for arbitration." Although on these facts the Seller would be entitled to appeal immediately on its counterclaim, as I understand the majority's opinion, the Buyer's claim would not be treated similarly – even though the district court has dismissed the entire action from its docket. To treat the two claims differently for purposes of appealability strikes me as incongruous. I find it equally unsatisfactory to impose upon the district courts the need to enter orders under Fed. R. Civ. P. 54(b) designating part of a final and comprehensive judgment that disposes of all claims of all of the parties as somehow a separate "judgment" for purposes of appeal, which is the solution the majority has been forced to adopt to respond to this concern. See *ante* at 12, note 8. Such an approach deprives the Rule 58 final judgment of its principal virtues: clarity and definiteness, signaling the end of everything in the district court.

The majority frankly admits that it is concerned about the district court's ability, as it puts it, to determine whether or not the court of appeals will have jurisdiction over an appeal from an order requiring the parties to arbitrate. If the district court styles its order as a stay, it can then insulate itself from appellate review, while if the district court styles its order as a dismissal of the action without prejudice then appellate jurisdiction is secure. I do not disagree that the district courts have this power, nor was it any secret to the Congress that enacted FAA § 16. Congress specifically permitted different consequences for appellate jurisdiction in the statute. Whether or not we think the statutory lines make sense is somewhat beside the point. This is not a common law rule that we would be free to reshape as we wish. It is a statute, which we are obliged to respect.

The district courts enjoy similar powers in a variety of contexts, yet this does not justify our refusal to accept appeals. For example, the district court has discretion to decide whether or not to direct the entry of a partial final judgment under Fed. R. Civ. P. 54(b), or to begin the process of certification under 28 U.S.C. § 1292(b), but we do not condemn either of those two situations as an impermissible exercise of the district court's power to manipulate our own jurisdiction. Furthermore, from the standpoint of the parties, the difference between a stay and a dismissal of an action without prejudice is significant. A dismissal without prejudice requires the party who wants to invoke the aid of the court to return with a newly filed action. At the most mundane level, this step entails additional filing fees that must be paid to the court. More seriously, in having to re-file to pursue

"embedded" claims, a party could conceivably encounter problems with statutes of limitations, obtaining service of process, or other procedural barriers to the new case. See, *e.g., McCarthy,* 122 F.3d at 1249 (Pregerson, J., dissenting). In short, even though the consequences of the district court's decision to dismiss rather than to stay may appear to be similar from the standpoint of the arbitration proceeding, they can differ in significant ways. Neither the parties nor the district courts are likely to choose casually between the two options, when important rights are at stake that at least one party will normally wish to protect.

Because I would find that we have jurisdiction over the appeal, I add a brief word about the merits. The lease between Katherine and General Motors indisputably contained a mandatory arbitration clause, which read as follows:

> *Section 8.01.* In case any differences arise between the Lessor and the Lessee regarding the true meaning and intent of any of the terms and provisions of this lease or if any dispute should arise between them regarding the performance or nonperformance by either of them of any of the terms, covenants and conditions hereof, or if any claim is made by either of them that the other is in default by reason of the non-performance of any act provided for hereunder, then, and in any of such events, the matter in dispute, whether the same be the performance of an act, the forbearance of an act, or the payment of money, shall be submitted to arbitration. . . .

Section 10.08 of the lease specified the way in which notices were to be transmitted, and section 1.02 set forth the procedure for lease renewals. Without belaboring the

point, in light of the fact that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Nielsen v. Piper, Jaffray & Hopwood, Inc.*, 66 F.3d 145, 148 (7th Cir. 1995) (internal brackets and ellipsis omitted), I have no trouble concluding that the dispute between Katherine and GM fell within the scope of this broad arbitration clause. Katherine's arguments to the contrary border on the frivolous: she claims GM has already admitted "nonperformance" because it acknowledges that it sent the renewal notice to her *husband* (who lived at the same address), and thus the lack of proper notice to the record owner made the lease, along with the arbitration clause, lapse according to its own terms. These are arguments on the merits, which the arbitrator will be free to consider; they in no way negate the fact that there is a dispute between the parties about the way in which GM performed its act of renewing the lease pursuant to section 1.02, and its compliance with the notice requirements of section 10.08.

I would therefore find that we have appellate jurisdiction over this case and I would affirm the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 18, 1998

BEFORE:

Honorable RICHARD D. CUDAHY, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

No. 96-3355

KATHERINE R. NAPLETON, not individually, but as Trustee under the Katherine R. Napleton Revocable Self-Declaration of Trust dated October 1, 1992,

Plaintiff - Appellant

v.

GENERAL MOTORS CORPORATION,

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 96 C 163, Brian Barnett Duff, Judge

This appeal is DISMISSED, with costs, for lack of appellate jurisdiction, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

William Robert Quinlan
Quinlan & Crisham, P.C.
161 North Clark Street
Suite 2300
Chicago, IL 60601

Case Number: 1:96-cv-00163

Title: Napleton v. GMC

Assigned Judge: Honorable Brian Barnett Duff

MINUTE ORDER of 7/29/96 by Hon. Brian Barnett Duff: As stated in this order, this court grants the motion to dismiss [8-1] without prejudice to allow for arbitration. (See reverse of minute order.) Mailed notice

This docket entry was made by the Clerk on July 30, 1996

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
Brian Barnett Duff

Sitting Judge if Other Than Assigned Judge

Case Number 96 C 163

Date July 29, 1996

Case Title
Katherine R. Napleton v. General Motors Corp.

DOCKET ENTRY:

* * *

(10) ✔ [Other docket entry]

As stated in this order, this court grants the motion to dismiss without prejudice to allow for arbitration.

/s/ Brian Barnett Duff

(11) ✔ [For further detail see [✔] order on the reverse of [ ] order attached to the original minute order form.]

✔ Docketing to mail notices.

July 30, 1996

(Reserved for use by the Court)

ORDER

This dispute results from General Motors' ("GM") alleged nonperformance of the renewal term in a lease between GM and Napleton, a successor in interest to the lease. The parties differ as to whether this issue is subject to the lease's arbitration clause. In an attempt to resolve this dispute, GM filed this motion to dismiss or stay the action pending arbitration on March 12, 1996.

As a preliminary matter, this court notes that arbitration is a favored method of dispute resolution. However, the parties to an arbitration agreement are only bound to arbitrate those issues which by clear language and their intentions expressed in the language show they have agreed to arbitrate. *Flood v. Country Mutual Ins. Co.*, 41 Ill.2d 91 (1968). "In construing instruments of submission to arbitration, courts always give as large a construction to them, as the words of the instrument and their intentions of parties, drawn from their expression, will warrant." *Rauh v. Rockford Products Corp.*, 143 Ill.2d 377, 574 N.E.2d 636 (1991).

The lease entered into by General Motors and Napleton's predecessor-in-interest specifies that differences which arise regarding "the true meaning and intent of any of the terms and provisions of this lease or if any dispute should arise . . . regarding the performance or nonperformance . . . of any of the terms, covenants and conditions . . . " should be submitted to arbitration. Def. mot. ex. B. This court finds that the issue of whether General Motors provided timely notice of their intention to renew the lease and whether it was given to the

appropriate person constitutes a dispute regarding performance or nonperformance of the contract terms, which is precisely the type of issue the parties intended to submit to arbitration.

The state law cases on which the plaintiff relies are distinguishable from the case at bar. This case neither involves a dispute as to the validity of a contract nor is it an issue of law determinable only by a court. Moreover, the case at bar does not concern whether the parties intended a specific issue to be covered by a general arbitration clause. Unlike many of the cases cited by the plaintiff, this case does not involve a general arbitration clause purported to apply to "any controversy or claim arising out of or relating to this agreement." The arbitration clause at issue is more limited. The parties made their intention clear that arbitration was to be used in three situations. Performance or nonperformance is one of these situations; arbitration is, therefore, the avenue the parties must pursue. Accordingly, this court grants the motion to dismiss without prejudice to allow for arbitration.

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
Judge Brian Barnett Duff

Sitting Judge if Other Than Assigned Judge

Case Number 96 C 0163

Date 8/11/96

Case Title
Katherine R. Napleton v. General Motors Corporation

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

PLAINTIFF'S MOTION TO RECONSIDER THIS COURT'S ORDER DISMISSING THIS ACTION PENDING ARBITRATION

DOCKET ENTRY:

(1) __X__ Filed motion of [use listing in "MOTION" box above]

* * *

(10) __X__ [Other docket entry] The motion is denied for the reasons stated on the record.

__X__ No notices required advised in open court.

X courtroom deputy's Initials

August 23, 1996

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 19, 1998

Before

Honorable Richard A. Posner, *Chief Judge*
Honorable Walter J. Cummings, *Circuit Judge*
Honorable Richard D. Cudahy, *Circuit Judge*
Honorable John L. Coffey, *Circuit Judge*
Honorable Frank H. Easterbrook, *Circuit Judge*
Honorable Kenneth F. Ripple, *Circuit Judge*
Honorable Daniel A. Manion, *Circuit Judge*
Honorable Michael S. Kanne, *Circuit Judge*
Honorable Ilana Diamond Rovner, *Circuit Judge*
Honorable Diane P. Wood, *Circuit Judge*
Honorable Terence T. Evans, *Circuit Judge*

KATHERINE R. NAPLETON, not individually, but as Trustee under the Katherine R. Napleton Revocable Self-Declaration of Trust dated October 1, 1992,

Plaintiff-Appellant

No. 96-3355 v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

Appeal for the United States District Court for the Northern District of Illinois, Eastern Division.

No. 96-C-0163

Brian Barnett Duff, *Judge.*

ORDER

The plaintiff-appellant has filed a petition for rehearing and suggestion for rehearing en banc. On consideration of the petition, a vote of the active members of the court was requested. A majority did not favor rehearing en banc. Chief Judge Posner and Circuit Judges Cummings, Easterbrook, Rovner, and Diane P. Wood voted to grant rehearing en banc. Circuit Judge Flaum took no part in the decision. A majority of the judges on the original panel did not favor a rehearing. Circuit Judge Diane P. Wood voted to grant a rehearing.

Accordingly, the petition for the plaintiff-appellant is DENIED.